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UNITED RENEWABLE ENERGY CO LTD v. TS SOLARTECH SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[ORIGINATING SUMMONS NO: WA-24NCC-234-05-2019]
B 5 AUGUST 2019
[2019] CLJ JT(6)

C ***COMPANY LAW:*** *Shares – Transmission of shares – Merger of companies – Passing of title of shares held by preceding company to succeeding company – Succeeding company requested to be registered as shareholder of company in respect of ordinary shares – Company refused to recognise passing of title of shares held by preceding company to succeeding company – Whether merger carried transmission of shares to succeeding company by operation of law – Whether transmission of shares ought to be registered – Whether register of members ought to be rectified –* D *Whether succeeding company must execute share transfer form and Board resolution approving share transfer – Difference between transmission of shares and transfer of shares – Doctrine of universal succession – Companies Act 2016, ss. 103, 105(1), (4) & 109(1)*

E The plaintiff, a public-listed company in Taiwan, was the successor company after a merger between three companies, namely Solartech Energy Corp ('Solartech'), Gintech Energy Corporation ('Gintech') and Neo Solar Power Energy Corp ('Neo Solar'). The defendant, a company incorporated and registered in Malaysia, was originally formed as a joint venture company between Solartech and Tek Seng Holdings Bhd ('Tek Seng'). Tek Seng, F Solartech and the defendant had entered into a shareholders' agreement. Solartech then merged with Gintech and Neo Solar ('merger') resulting in one single merged entity, namely Neo Solar, which then changed its name to United Renewable Energy Co Ltd ('URE'), the plaintiff. Following the merger, the plaintiff, being the surviving company, assumed all rights, assets G and liabilities of the preceding company and this included the shares which were originally owned by Solartech. The plaintiff informed the defendant of the transmission of the 97,700,693 ordinary shares in the defendant currently held in the name of Solartech ('TS shares'), and requested that the defendant, *inter alia*, register the plaintiff as the shareholder of the defendant in respect of the TS shares, pursuant to s. 109(1) of the Companies Act 2016 ('CA'). H However, the defendant refused and/or failed to register the plaintiff as the shareholder of the defendant in respect of the TS shares on the grounds that (i) the plaintiff must execute a share transfer form, Form 32A, and a Board resolution approving the share transfer; and (ii) the merger, being a voluntary exercise, could not be classified as a transmission by operation of law. I Hence, the present originating summons ('OS') filed by the plaintiff to recognise that the shares in the defendant, originally owned by Solartech, had been transmitted by operation of law to the single merged successor entity, being URE. In the OS, the plaintiff sought for, *inter alia*, (i) a declaration that

the merger had carried, into effect, a transmission of the TS shares to the plaintiff by operation of law; and (ii) consequential orders for registration of the transmission of shares and rectification of that register of members ('ROM') of the company to include the plaintiff's name as the new shareholder of the TS shares. In support of its OS, the plaintiff obtained an expert report which provided that, under the laws of Taiwan, the merger had caused the plaintiff to assume all rights, obligations, assets and properties of the predecessor companies, namely Solartech and Gintech; this would include the TS shares held in the name of Solartech.

Held (allowing order in terms of originating summons):

(1) In law, there is a distinction between a 'transfer of shares' and a 'transmission of shares'. A transfer, in its natural meaning, connotes a transfer from one person to another. There is an active member and there must be a transferor and transferee and a proper instrument of transfer must be delivered to the company. By contrast, a transmission of shares is an automatic devolution of title which takes place by operation of law upon the occurrence of a legally significant event. A universal succession, pursuant to a merger, has been recognised as a form of a transmission by operation of law. Universal succession is a legal concept of a successor company assuming all rights and liabilities of the preceding company pursuant to a merger under foreign law. In such situation, there is no transferor or transferee and no active act of transfer by a member. (paras 23, 24, 31 & 32)

(2) Since Neo Solar, Solartech and Gintech were established under Taiwan law and were existing in the form of a company limited by shares, in accordance with arts. 75 and 319 of the Taiwan Company Act, the plaintiff, being the surviving company of the merger, had assumed all rights, obligations, assets and liabilities of Solartech and Gintech, pursuant to and after the merger. Following the authorities on the doctrine of universal succession and based on the unrebutted expert report by the plaintiff and the facts of this case, the TS shares had been transmitted to the plaintiff by operation of law. There was an automatic devolution of title in the TS shares to the plaintiff by operation of law upon the occurrence of the merger. It was not a transfer as there was no active act of a transfer by a member. (paras 43 & 44)

(3) The defendant erred when it contended that it was not in the position to register the plaintiff as a shareholder as the plaintiff failed to execute and furnish the share transfer documents. The share transfer documents were not required in the event of a transmission of the TS shares by operation of law. The statutory requirement for an instrument of transfer in respect of a share transfer is provided for in s. 105(1) of the CA. This provision states that a duly executed and stamped instrument of transfer, Form 32A, is required when any shareholder transfers his shares. By virtue of s. 105(4) of the CA, the statutory requirement for an instrument

of transfer, under s. 105(1) of the CA, shall not affect any power of a company to register a person as a shareholder where the shares have been transmitted by operation of law. From the wording of s. 105(1), read with s. 105(4) of the CA, it is evident that the requirement for an instrument of transfer only applies to a transfer of shares and not a transmission by operation of law. (paras 49 & 51-54)

(4) The plaintiff was entitled to be registered as a shareholder of the company, in place of Solartech, in respect of the TS shares without the need for the share transfer documents. Section 103 of the CA provides that an application could be made to the court for the rectification of the ROM of a company in the event that the applicant's name had been wrongly omitted from the ROM. The plaintiff was an 'aggrieved person' within the meaning of s. 103(1) of the CA given that the plaintiff's name had been wrongly omitted from the ROM notwithstanding that the TS shares had been transmitted to the plaintiff as a consequence of the merger. (paras 45, 47 & 57)

Case(s) referred to:

Astra SA Insurance and Reinsurance Co v. Sphere Drake Insurance Ltd [2000] All ER (D) 672 ***(refd)***

BNP Paribas Wealth Management v. Jacob Agam and Another [2017] 4 SLR 14 ***(refd)***

Jacob Agam and Another v. BNP Paribas SA [2017] 2 SLR 1 ***(refd)***

JX Holdings Inc And Another v. Singapore Airlines Ltd [2016] SGC 212 ***(refd)***

Lee Eng Eow v. Low Ah Lian & Anor [1991] 3 CLJ 2874; [1991] 3 CLJ (Rep) 131 HC ***(refd)***

Moodie v. W & J Shepherd (Bookbinders) Ltd [1946] 2 All ER 1044 ***(refd)***

National Bank of Greece and Athens SA v. Metliss [1958] AC 509 ***(refd)***

Ng Chong Wee v. Ng Chong Geng & Sons Sdn Bhd [2018] 1 LNS 967 CA ***(refd)***

Re Kenzler (1983) 7 ACLR 767 ***(refd)***

Re LY Swee & Company Ltd; Khoo Leong Kee v. LY Swee & Co Ltd [1968] 1 LNS 121 HC ***(refd)***

Re Sidex Australia Pty Ltd; Sipad Holding ddpo v. Popovic [1995] 18 ASCR 436 ***(refd)***

Seah Teong Kang And Another v. Seah Yong Chwan [2015] SGCA 48 ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 103(1), (2), 105(1), (4), 109(1), (5)
Evidence Act 1950, s. 45(1)
Rules of Court 2012, O. 92 r. 4

Banking Act (Cap 19) [Sing], s. 55B(1), (2)
Commercial Code [France], art. L. 236-3
Companies Act (Cap 50) [Sing], s. 130(1)
Companies Code [NSW], s. 183(2)
Company Act [Taiwan], arts. 75, 319

For the plaintiff - Lee Shih & Joyce Lim Hwee Yin; M/s Skrine
For the defendant - Khoo Kay Ping & Louis Chong; M/s Zaid Ibrahim & Co

Reported by Najib Tamby

JUDGMENT

Ong Chee Kwan JC:

[1] The judgment deals with the refusal by a company to recognise the passing of title of the shares of the company held by its foreign shareholder to a succeeding company resulting from a merger agreement at place of incorporation of the foreign shareholder as a transmission by operation of law. The judgment looks at the difference between 'transfer' and 'transmission by operation of law', the doctrine of universal succession and the rectification of the register of members to give effect to the transmission.

Background

[2] The plaintiff is a public-listed company in Taiwan and the successor company after a merger between three solar-related Taiwanese companies, namely Solartech Energy Corp ("Solartech"), Gintech Energy Corporation ("Gintech") and Neo Solar Power Energy Corp ("Neo Solar").

[3] The plaintiff is in the business of developing, designing, building and maintaining solar photovoltaic and energy storage systems for utilities, industrial and commercial companies, independent power producers, and electrical membership co-operatives.

[4] The defendant is a company incorporated and registered in Malaysia with registered address at 51-21-A, Menara BHL Bank, Jalan Sultan Ahmad Shah, Georgetown, 10500 Pulau Pinang. The defendant is principally involved in the business of manufacturing and sales of photovoltaic products such as solar cells, solar panels or solar modules.

[5] The defendant was originally formed as a joint venture company between Solartech and Tek Seng Holdings Berhad ("Tek Seng"), a company listed on the Main Market of Bursa Malaysia Securities Berhad. The current shareholding of Tek Seng and Solartech in the defendant is 50.7% and 42.1% respectively.

[6] In conjunction with the parties' entry into the joint venture, Tek Seng, Solartech and the defendant entered into a shareholders' agreement on 2 December 2014 to regulate their rights as shareholders and their rights in relation to the joint venture company.

[7] On 1 October 2018 Solartech merged with Gintech and Neo Solar ("merger") resulting in one single merged entity namely, Neo Solar. Neo Solar then changed its name to United Renewable Energy Co Ltd ("URE"), the plaintiff.

[8] Prior to the merger, Neo Solar, Gintech and Solartech were participating in different production segments of the silicon wafer, solar cell, solar module, power grid, and other solar energy supply chains more than ten years.

[9] In October 2017, it was reported by the media, including The China Post and The Taipei Times, that Neo Solar, Gintech and Solartech had announced plans to merge into a single solar flagship company.

[10] The merger was aimed to facilitate the vertical integration of the solar industry in Taiwan and construct a winning business model by leveraging each company's strengths to optimise capacity and increase bargain power as well as market shares.

[11] On 29 January 2018, Gintech, Solartech and Neo Solar executed a merger agreement where it was agreed that the parties shall be merged into one corporation to build a flagship class solar energy-oriented enterprise in Taiwan ("merger agreement").

[12] It was also agreed that Neo Solar shall be the surviving company pursuant to the merger and shall be renamed as URE on the effective date of the merger. A press release statement was issued by Neo Solar, Solartech and Gintech on 29 January 2018 to announce the signing of the merger agreement.

[13] On 1 October 2018, the merger was completed.

[14] In accordance with the merger agreement, Neo Solar became the surviving company and was thereafter renamed as URE. This is evident from the following documents:

(i) memo dated 18 October 2018 issued by the Hsinchu Science Park Bureau, Ministry of Science and Technology ("MOST") to the plaintiff (along with the alteration registration card of the plaintiff), which states that the plaintiff's application to change its name from Neo Solar to URE had been accepted ("MOST memo dated 18 October 2018");

(ii) announcement on the Taiwan Stock Exchange on 22 November 2018 regarding the renaming of Neo Solar to URE and the details of the trading of shares of the URE ("TSE memo dated 22 November 2018");

(iii) memo dated 10 December 2018 issued by the MOST to the plaintiff (along with the alteration registration card of the plaintiff), which states that the plaintiff's application to change its name from Neo Solar to URE had been accepted ("MOST memo dated 10 December 2018"); and

(iv) announcement on the Taiwan Stock Exchange Market Observation Post System dated 18 December 2018 ("MOPS memo dated 18 December 2018") which states that the plaintiff had been renamed from Neo Solar to URE as a result of the merger.

[15] As a consequence of the merger, the plaintiff, being the surviving company, assumed all rights, assets and liabilities of the preceding company. This included the TS shares which were originally owned by Solartech.

[16] The plaintiff's solicitors informed the defendant in writing of the transmission of the TS shares and requested that the defendant among others, register the plaintiff as shareholder of the defendant in respect of the TS shares. The request was made under s. 109(1) of the Companies Act 2016.

[17] Pursuant to s. 109(5) of the CA 2016, the defendant is required to register the plaintiff as a shareholder of the defendant in respect of the TS shares within 60 days from receiving the notification.

[18] The exchange of communication between the plaintiff's solicitors and the defendant is set out below:

(i) On 15 November 2018 ("plaintiff's November letter"), the plaintiff's solicitors informed the company secretary of the defendant ("company secretary") that the merger had carried into effect a transmission of the TS shares to the plaintiff by operation of law. The plaintiff's solicitors also requested that the company secretary carry out the following:

(a) to register the plaintiff as shareholder of the defendant in respect of the TS shares with effective date of 1 October 2018 by entering the plaintiff's name in the defendant's register of members;

(b) to notify CCM of the changes in the particulars of the defendant's register of members; and

(c) to issue and deliver a share certificate to the plaintiff in respect of the TS shares.

(ii) On 15 November 2018, the company secretary responded by way of email to the plaintiff's solicitors to state that the plaintiff's November letter will be forwarded to the board of directors of the defendant for their consideration and action.

(iii) On 5 December 2018, the plaintiff's solicitors wrote to the company secretary to follow up on the plaintiff's November letter.

(iv) By way of email dated 5 December 2018, the company secretary:

(a) extended to the plaintiff's solicitors a copy of an email from CCM dated 3 December 2018. In this email, CCM had stated that "we are of the opinion based on your email below that there is no transfer *per se* as the holding company was merged with another entity and all assets and liabilities of the merged entities have legally transferred and vested into the acquiring entity which is now the new owner", and had requested for documents and/or information to confirm the merger and the effect thereof; and

(b) requested that the plaintiff provides the documents and/or information requested by CCM.

(v) On 7 February 2019, the plaintiff's solicitors issued a letter to the company secretary enclosing the documents and/or information requested by CCM in its email to the company secretary dated 3 December 2018.

(vi) On 1 March 2019, the company secretary informed the plaintiff's solicitors of CCM's position (in CCM's email dated 27 February 2019 to the company secretary) that the updating of the register of members of the company cannot be carried out through documents relating to the merger or the amalgamation of shares only.

(vii) By way of letter dated 11 March 2019 from the plaintiff's solicitors to the company secretary, the plaintiff reiterated its request that the defendant register the plaintiff as shareholder of the defendant in respect of the TS shares and issue a share certificate to the plaintiff accordingly.

(viii) On 13 March 2019, the company secretary provided the plaintiff's solicitors with a "form of transfer of securities" and a "directors' resolution" containing the company's approval of the transfer of the TS shares (collectively, the "share transfer documents"). The company secretary had requested that the plaintiff execute these documents.

(ix) On 14 March 2019, the plaintiff's solicitors wrote to the company secretary and explained to the company secretary that the plaintiff was unable to execute the share transfer documents due to the following reasons:

(a) the share transfer documents are only required if there had been a transfer of shares, which is not the case here. In the present circumstances, the merger had carried into effect a transmission of the TS shares to the plaintiff by operation of law; and

(b) the plaintiff may be registered as a shareholder of the company in respect of the TS shares without having to execute the share transfer documents.

(x) On 15 March 2019, the company secretary informed the plaintiff's solicitors that "since the transfer document is not required as mentioned by you, then please advise your client on the actions required to effect the change of shareholders in TSST then. Upon the change being done, we would appreciate if you could forward the updated ROM to us so that we could manually update the statutory records of TSST."

[19] To date, despite numerous requests and reminders, the defendant has refused and/or failed to register the plaintiff as shareholder of the defendant in respect of the TS shares and to issue a share certificate to that effect. As such, the plaintiff has filed this originating summons.

[20] The plaintiff is now bringing this action to recognise that the shares in the defendant originally owned by Solartech have been transmitted by operation of law to the single merged successor entity, being URE.

[21] In the originating summons, the plaintiff is seeking for, among others, the following:

(i) a declaration that the merger had carried into effect a transmission of the 97,700,693 ordinary shares in the defendant currently held in the name of Solartech ("TS shares") to the plaintiff by operation of law; and

(ii) consequential orders for registration of the transmission of shares and rectification of the register of members ("ROM") of the company to include the plaintiff's name as the new shareholder of the TS shares.

[22] The defendant has failed and/or refused to rectify the ROM to include the plaintiff's name as the shareholder of the TS shares on the basis that a share transfer form (Form 32A) and a board resolution approving the share transfer must be executed by the plaintiff. The defendant contended that the merger, being a voluntary exercise cannot be classified as a transmission by operation of law.

Distinction Between "Transfer" And "Transmission" Of Shares

[23] In law, there is a distinction between a "transfer of shares" and a "transmission of shares".

[24] A transfer in its natural meaning connotes a transfer from one person to another. There is an active act of a member. There must be a transferor and a transferee, and a proper instrument of transfer must be delivered to the company. By contrast, a transmission of shares is an automatic devolution of title which takes place by operation of law upon the occurrence of a legally significant event (See: *Lee Eng Eow v. Low Ah Lian & Anor* [1991] 3 CLJ 2874; [1991] 3 CLJ (Rep) 131; [1992] 1 MLJ 678 (HC); *Re LY Swee & Company Ltd.; Khoo Leong Kee v. LY Swee & Co Ltd* [1968] 1 LNS 121; [1968] 2 MLJ 104 (OCJ)).

[25] The concept of a transmission of shares by operation of law was explained by the Malaysia Court of Appeal in *Ng Chong Wee v. Ng Chong Geng & Sons Sdn Bhd* [2018] 1 LNS 967; [2018] MLJU 934 to mean "a mechanism by which the title to shares is devolved other than by transfer. The concept will be relevant in cases related to inheritance, succession, devolution by death, etc. Transmission by operation of law is not a transfer".

[26] *Ng Chong Wee*'s case *(supra)* involved the rights of beneficiaries of deceased shareholders in a private limited company. The court held that a personal representative of a deceased shareholder who is recognised by the company to have stepped into the shoes of the deceased shareholder is said to have been vested with the shares by transmission, and not by a transfer.

[27] Other instances where the court found that there was a transmission of shares are:

(i) In the English House of Lords case of *Moodie v. W & J Shepherd (Bookbinders) Ltd* [1946] 2 All ER 1044, it was held that the transmission

of shares to the personal representatives of the deceased member was a transmission by operation of law as there was no act of transfer from one person to another. The court explained the distinction as follows:

> ... "Transfer", if the word is used in the ordinary sense, means a transfer from one person to another and implies that there must be both a transferor and transferee. But where in respect of shares forming part of the deceased's estate, there is no transfer from one person to another ...
>
> ...
>
> The distinction between transfer and transmission on death is important and is well recognised in company law. Transmission is the term used when shares vest in some person by operation of law, such as on the death or bankruptcy of a member ...;

and

(ii) In the Singapore Court of Appeal case of *Seah Teong Kang And Another v. Seah Yong Chwan* [2015] SGCA 48, it was held that the shares devolved upon the executor via the process of transmission which takes place by operation of law, and not by a transfer as it did not occur as a result of an act of the parties:

> In this regard, we should add that we agree with the judge that the proper characterisation of the manner by which the shares devolved upon the executor was via the process of transmission (which takes place by the operation of law) and not by a transfer (which occurs as a result of an act of the parties).

[28] The application of a transmission by operation of law is not limited to cases of death or bankruptcy. Indeed, the relevant provisions in the CA 2016 relating to a share transmission by operation of law (ss. 105(4) and 109) do not restrict the concept of transmission to cases of death and bankruptcy.

[29] Section 105(1) and (4) of the CA 2016 provide:

> 105. (1) Subject to other written laws, any shareholder or debenture holder may transfer all or any of his shares or debentures in the company by a duly executed and stamped instrument of transfer and shall lodge the transfer with the company.
>
> (4) Sub section (1) shall not affect any power of a company to register a person as a shareholder or debenture holder to whom the right to shares or debentures has been transmitted by operation of law.

[30] Section 109 of the CA 2016 provides:

> 109. (1) This section applies if the right to shares or debentures is transmitted to a person by operation of law and the person notifies the company in writing that the person wishes to be registered as a shareholder or debenture holder of the company in respect of the shares or debentures.

(5) The company shall register the person as a shareholder or debenture holder of the company in respect of the shares or debentures within sixty days from receiving the notification.

Universal Succession A Form Of Transmission By Operation Of Law

[31] A universal succession pursuant to a merger has been recognised as a form of a transmission by operation of law.

[32] Universal succession is a legal concept of a successor company assuming all rights and liabilities of the preceding company pursuant to a merger under foreign law. In such situation, there is no transferor or transferee, and no active act of transfer by a member.

[33] This concept has been widely recognised by the Commonwealth Courts.

[34] The leading case on this subject is the English House of Lords decision of *National Bank of Greece and Athens SA v. Metliss* [1958] AC 509 ("*Metliss*"). The *ratio* and facts of *Metliss* are set out below:

(i) This case laid down the principle that the succession of corporate personality is a matter which goes to the status of the foreign corporation and is therefore governed by the law of incorporation. As far as the law of the forum is concerned, once an entity is recognised as having the status of a universal successor, then it will be clothed with both the assets and liabilities.

(ii) The facts are briefly as follows. A Greek bank issued sterling bonds which provided that any disputes arising therefrom would be governed by English law. These bonds were guaranteed by yet another Greek bank. In 1941, payment of interest ceased as a result of World War 2. In 1953, the Greek Parliament passed an Act to amalgamate the guarantor bank with a third bank. The Act provided that the new entity ("new bank") was to be the universal successor to the rights and obligations in general of the amalgamated companies ie, the guarantor bank and the third bank. The bondholders subsequently brought a suit in the English courts to seek recovery of the unpaid interest on the bonds and the question was whether the new bank was liable on the ground that it had inherited the liabilities under the guarantee. The House of Lords unanimously answered this question in the affirmative and recognised the concept of universal succession. In particular, the court held that:

> the courts recognised not only the fact that the G. Bank was created by and existed under Greek law but also that it had been invested with the liabilities as well as the assets of the N. Bank and the A. Bank to which banks it was the universal successor.

[35] In the context of shares, the decision of the Federal Court of Australia in *Re Sidex Australia Pty Ltd; Sipad Holding ddpo v. Popovic* [1995] 18 ASCR 436 ("*Re Sidex*") is relevant. The facts and decision are set out below:

(i) Sidex Australia Pty Ltd ("Sidex Australia") was a company incorporated in New South Wales in 1970. In 1976, a substantial group of commercial enterprises operating in the former Republic of Yugoslavia traded together under a collective. A part of this collective, known as "Sour Sipad" was granted what was known under Yugoslav law as a "special legal subjectivity". Between 1986 and 1988, Sour Sipad subscribed for shares in Sidex Australia. In 1990, a law was passed to allow the creation of privatised corporations and Sour Sipad was one of the enterprises privatised. This new entity, referred to as the "new Sour Sipad", then applied for a rectification of the register of Sidex Australia to reflect the fact that it was the owner of the shares formerly held by the old Sour Sipad; and

(ii) The court granted this application for rectification. In coming to this decision, Lehane J held that changes to the law in the former Yugoslavia had led to the formation of the applicant which assumed the assets and liabilities of the former purchaser of the shares in the company:

> I think, however, that the conclusion to be drawn from the evidence of Mr Custovic is that the succession that occurred of the "new" to the "old" occurred under a law which is to be characterised as a law relating to status in the same sense as that which the House of Lords considered in *National Bank of Greece and Athens SA v. Metliss* [1958] AC 509. The result is that this court, applying our rules of private international law, will recognise and give effect to the transfer of assets and assumption of liabilities for which the Yugoslavian law provides.

[36] Recognition of the doctrine of universal succession was also seen in the English High Court decision of *Astra SA Insurance and Reinsurance Co v. Sphere Drake Insurance Ltd* [2000] All ER (D) 672. The facts and decision are set out below:

(i) In this case, the question arose was whether Astra had, as a matter of Romanian law, succeeded to the rights and liabilities of a former Romanian State Insurance Company ("ADAS"), and was thus liable under various policies and bound by the arbitration clauses contained in these policies. After the end of the communist era in Romania, many State-owned enterprises were transferred to commercial companies by operation of Romanian Law 15/1990. Pursuant to the Government Decision 1279/1990, which implemented this law, ADAS ceased to exist, and its assets and liabilities were divided among three new companies, one of which was Astra; and

(ii) The court held that by virtue of the Government Decision 1279/1990, the entire benefit and burden of ADAS' international insurance and reinsurance contracts had passed to Astra, and all the terms, including the arbitration clauses, were enforceable against Astra. It could not have been the intention of the Government to release ADAS or Astra from its liabilities under the reinsurance contracts in a manner neither contemplated nor permitted by the enabling legislation.

[37] The plaintiff further relies on the Singapore High Court decision of *JX Holdings Inc And Another v. Singapore Airlines Ltd* [2016] SGC 212 ("*JX Holdings*"), which was decided in the context of a universal succession pursuant to a merger. The facts of *JX Holdings* are substantially similar to present facts.

[38] In *JX Holdings*, the Singapore High Court held that the transfer of assets and liabilities through the process of a universal succession was a transmission and not a transfer within the meaning of the Singapore Companies Act (Cap 50, 2006 Rev Ed) ("Singapore Companies Act"). In coming to its decision, the Singapore High Court held that a transfer is a voluntary disposition of legal title to the shares brought by an act of the shareholder, whereas a transmission is an automatic devolution of title which takes place by operation of law upon the occurrence of a legally significant event, which includes a merger. As such, the shares in question had been transmitted to the succeeding company by operation of law and the succeeding company was entitled to be registered as a shareholder in place of the predecessor company without having to prepare and deliver a proper instrument of transfer. The facts of *JX Holdings* are relevant and are briefly as follows:

(i) A process of corporate succession took place under foreign law, which resulted in the foreign company, a Japanese company (X) being the successor to all the rights and liabilities of another foreign entity (Y);

(ii) The relief sought for was for the court to exercise its power to rectify the register to reflect the incidence of legal title;

(iii) This required the court to consider whether the passing of title from Y to X took place via a transfer (if so, relief should not be granted because no instrument of transfer was executed) or through a transmission by operation of law (where an instrument of transfer is not required);

(iv) In adopting the doctrine of universal succession, the court held that the status of a foreign corporation as it exists in its law of incorporation will be recognised by the courts of Singapore out of comity; and

(v) The court further found that the shares held by Y had been transmitted to X by operation of law and therefore X should be registered as owner of the shares which were originally owned by Y.

[39] Another relevant case in the context of a merger is the Singapore International Commercial Court (SICC) decision of *BNP Paribas Wealth Management v. Jacob Agam and Another* [2017] 4 SLR 14 (which was upheld on appeal in *Jacob Agam and Another v. BNP Paribas SA* [2017] 2 SLR 1):

(i) The brief facts are as follows. BNP Paribas Wealth Management ("BNPWM") was a bank incorporated in France and a wholly-owned subsidiary of BNP Paribas SA ("BNPSA"). In October 2016, BNPWM merged with BNPSA pursuant to a merger agreement governed by French law which provided for a merger pursuant to the French

Commercial Code. As a result, BNPWM was dissolved and its assets and liabilities were assumed by BNPSA under the doctrine of universal succession under French law. One of the issues to be determined by the SICC was whether the assumption of the plaintiff's business in Singapore to BNPSA should not be given effect because it was in breach of s. 55B of the Singapore Banking Act (Cap 19, 2008 Rev Ed), which provides, among others, that for any voluntary transfer of business, court approval for the transfer must be obtained. It should be noted that s. 55B(2) of the Banking Act stated that the said mechanism of transfer requiring court approval under s. 55B(1) was without prejudice to the right of a bank to transfer the whole or any part of its business under any law; and

(ii) The SICC cited *JX Holdings* with approval and held that court approval was not required. Although the merger may be regarded as a voluntary act between the parties, BNPWM and BNPSA are companies which were incorporated in France and the merger agreement was effected through art. L.236-3 of the French Commercial Code. This article, which is concerned with the particular event of merger, provides a means by which there can be a merger whereby the assets of one company are automatically transferred to another company. The succession to corporate personality in the merger of French incorporated companies being governed by French law, the transfer thereunder will be recognised by this court.

[40] In the present case, the plaintiff has obtained an expert report dated 30 April 2019 from one Eddie Chih Wei Chan, a solicitor admitted to practice in Taiwan, on the consequences of the merger ("plaintiff's expert report"). The defendant has not obtained any expert report to rebut the points set out in the plaintiff's expert report.

[41] Before setting out the contents of the plaintiff's expert report, it is highlighted that an opinion upon a point of foreign law can be proved by evidence of experts. This is in accordance with s. 45(1) of the Evidence Act 1950, which provides that when the court has to form an opinion upon a point of foreign law, the opinions upon that point of persons specially skilled in that foreign law are relevant facts, and such persons are known as experts.

[42] The plaintiff's expert report provides that under the laws of Taiwan, the merger had caused the plaintiff to assume all rights, obligations, assets and properties of the predecessor companies, namely Solartech and Gintech. This would include the TS shares currently held in the name of Solartech. The following excerpts from the plaintiff's expert report are relevant:

> Article 75 of the Company Act provides that all rights and obligations of an unlimited company dissolved due to a merger shall be generally assumed by the surviving company, which is applied *mutatis mutandis* to a merger of company limited by shares according to Article 319 of the Company Act.

...

Article 24 of the [Business Mergers and Acquisitions Acts of Taiwan] further provides that the assumption of all rights and obligations pertaining to any properties acquired by the surviving company from the dissolving company shall take effect on the effective date of the merger.

...

In accordance with the abovementioned laws, the rights and obligations of a dissolving company in a merger shall be automatically and generally assumed by the surviving company of the merger, effective on the effective date of such merger.

The participating companies are not required to take any further action of transfer or assignment to give effect to such assumption under the relevant laws. Even if the change of certain right under a merger is required to be registered, the lack of due registration does not render such change of right ineffective. In this connection, without further action, all assets and properties of both Solartech and Gintech have automatically been assumed by URE on October 1, 2018, the effective day of the Merger.

[43] Since each of Neo Solar, Solartech and Gintech were established under Taiwan law and were existing in the form of a company limited by shares, in accordance with arts. 75 and 319 of the Taiwan Company Act, the plaintiff (formerly named NSP prior to the merger), being the surviving company of the merger, had assumed all rights, obligations, assets and liabilities of Solartech and Gintech, pursuant to and after the merger.

[44] Following the authorities cited above on the doctrine of universal succession and based on the unrebutted plaintiff's expert report and the facts of this case, I am inclined to hold that the TS shares have been transmitted to the plaintiff by operation of law. There had been an automatic devolution of title in the TS shares to the plaintiff by operation of law upon the occurrence of the merger. It was not a transfer as there was no active act of a transfer by a member.

Applicable Provision - Section 103 of the CA 2016

[45] Section 103 of the CA 2016 provides that an application can be made to the court for the rectification of the register of members of a company in the event that the applicant's name had been wrongly omitted from the register of members.

[46] For easy reference, s. 103 of the CA 2016 is set out below:

Rectification

103. (1) If the name of a person is wrongly entered in, or omitted from the register of members, the person aggrieved may apply to the Court for:

(a) rectification of the register of members;

(b) compensation for loss sustained; or

(c) both rectification and compensation.

(2) On an application under this section, the Court may order

(a) the rectification of the register of members by the company;

(b) the payment of compensation by the company or an officer who has caused the error or omission for any loss sustained; or

(c) the rectification and payment of compensation.

[47] The plaintiff is an "aggrieved person" within the meaning of s. 103(1) of the CA 2016 given that the plaintiff's name had been wrongly omitted from the ROM notwithstanding that the TS shares have been transmitted to the plaintiff as a consequence of the merger.

[48] Pursuant to s. 103(2) of the CA 2016 and O. 92 r. 4 of the Rules of Court 2012, this Honourable Court has the jurisdiction and powers to grant the prayers sought by the plaintiff in the originating summons, and in particular, the rectification of the ROM of the company.

Share Transfer Documents Not Required For Transmission Of Shares

[49] I agree with learned counsel for the plaintiff that the defendant had erred when it contended that it was not in a position to register the plaintiff as a shareholder as the plaintiff had failed to execute and furnish the share transfer documents.

[50] The defendant has acknowledged that the plaintiff is the new owner of the TS shares pursuant to the merger, and the only issue is how the registration ought to be carried out. This is evident from:

(i) paragraph 6 of the defendant's first AIR which states that the company verily believes that the TS shares have transferred to the plaintiff; and

(ii) paragraph 9 of the defendant's written submissions dated 17 July 2019 where it is stated that the "defendant has taken all reasonable steps in attempting to effect the said registration (of the TS share)".

[51] I accept the submission of learned counsel for the plaintiff that the share transfer documents are not required in the event of a transmission of the TS shares by operation of law.

[52] The statutory requirement for an instrument of transfer in respect of a share transfer is provided for in s. 105(1) of the CA 2016. This provision states that a duly executed and stamped instrument of transfer (Form 32A) is required when any shareholder transfers his shares:

Requirement for instrument of transfer

105. (1) Subject to other written laws, any shareholder or debenture holder may transfer all or any of his shares or debentures in the company by a duly executed and stamped instrument of transfer and shall lodge the transfer with the company.

[53] By virtue of s. 105(4) of the CA 2016, the statutory requirement for an instrument of transfer under s. 105(1) of the CA 2016 shall not affect any power of a company to register a person as a shareholder where the shares had been transmitted by operation of law:

> (4) Subsection (1) shall not affect any power of a company to register a person as a shareholder or debenture holder to whom the right to shares or debentures has been transmitted by operation of law.

[54] It is therefore evident from the wording of s. 105(1) read with s. 105(4) of the CA 2016 that the requirement for an instrument of transfer only applies to a transfer of shares, and not a transmission by operation of law.

[55] The merger had carried into effect a transmission of the TS shares to the plaintiff by operation of law, and not a transfer. As such, the statutory requirement for an instrument of transfer pursuant to s. 105(1) of the CA 2016 is not applicable.

[56] This is supported by the following cases:

(i) Court of Appeal case of *Ng Chong Wee v. Ng Chong Geng & Sons Sdn Bhd* [2018] 1 LNS 967; [2018] MLJU 934, where it was held that "a "transmission" of shares is distinct from a "transfer" and is not subject to the requirement that it must be accompanied by an instrument of transfer". The court in this case did not allow the registration of the transmission of shares to the personal representative of the deceased shareholder based on the specific facts of the case, which is because the articles of the respondent company had provided the directors of the respondent company with such a right of refusal. In the present case, there is no such right.

(ii) Singapore High Court decision of *JX Holdings*, where it was held that the transfer of assets and liabilities through the process of universal succession was a transmission and not a transfer within the meaning of the Singapore Companies Act. As such, the succeeding company may be registered as a shareholder in place of the predecessor company without having to prepare and deliver a proper instrument of transfer which was required pursuant to s. 130(1) of the Singapore Companies Act:

> [2] Section 130(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") prohibited public companies from registering transfers of shares not accompanied by proper instruments of transfer. It was intended to ensure the payment of stamp duty. However, a transmission of shares was distinct from a transfer and was not subject to the requirement that an instrument of transfer had to be used. A transfer was a voluntary disposition of legal title to the shares brought about by an act of the shareholder; a transmission, by contrast, was an automatic devolution of title which took place by operation of law upon the occurrence of a legally significant event: at [17] and [18]

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> [3] The change in ownership of assets (including shares) that accompanied a process of universal succession took place by operation of law. It was therefore a transmission and not a transfer within the meaning of the Companies Act. For this reason, a succeeding company might be registered as a shareholder in place of its predecessor company without there being any need for a proper instrument of transfer to be prepared and delivered: at [37] and [43(d)].

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(iii) Supreme Court of Queensland decision of *Re Kenzler* (1983) 7 ACLR 767, where it was similarly held that a "transmission" of shares is distinct from a "transfer" and is not subject to the requirement of an instrument of transfer:

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(a) The facts of *Re Kenzler* are as follows. A testator died leaving behind a parcel of shares in a company to one of the executors of his will who was also the residuary legatee. The executor sought to have the shares registered in her own name and, to that end, instructed solicitors who wrote to the company enclosing a document executed by the executors. However, the application for registration was refused by the board of directors purporting to exercise their discretion under the company's articles to decline to register any proposed "transfer" of shares. McPherson J allowed the executor's application for an order that the shares be registered in her name. He regarded this application for registration as a "transmission" because title to the shares passed to the residuary legatee by operation of law under the will, and held that the directors had no power under the company's articles to refuse registration of what was properly a "transmission" of shares rather than a "transfer".

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(b) The following extracts from McPherson J's judgment (at 772-774) are particularly instructive in this regard:

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> At the time of the request for registration the Act was in force. It provided in s. 95(1) that a company should not register a transfer of shares unless a proper instrument of transfer had been delivered to the company, adding however that "this sub-section shall not prejudice any power to register as a shareholder ... any person to whom the right to any shares in ... the company has been transmitted by operation of law". The principal purpose of this provision was to prevent evasion of stamp or conveyance duty: cf *Re Greene* [1949] Ch 333 at 339, and this is borne out by the exception in favour of transmission.

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> From the terms of the provisions referred to and from statements in the decided cases, it is clear that a distinction is drawn between a transfer of shares, and a transmission whether it takes place by will or on bankruptcy or otherwise by operation of the law ... It is also, I think, clear from these

> authorities that restrictions on transfer are not ordinarily applicable to transmissions unless there is some compelling textual indication to the contrary in the articles themselves.
>
> ...
>
> The document headed 'transmission' forwarded by the applicant's solicitors is therefore not to be regarded as an application for transfer of the shares from the executors, but simply as a request implying their assent to the transmission from the deceased of legal title to the shares which by virtue of the will devolved on the applicant by operation of law. Article 22(b) operates, as I have said, only upon a 'proposed transfer' of shares, and consequently does not affect the right of a legatee, such as the applicant, to transmission of the shares into her name. There being no other power in the article on which the directors could or did rely, the applicant was and is entitled to registration of the shares in her own name.

(iv) In *Re Sidex* (cited in para. [25] above), the court granted the application for a rectification of the register of members on the basis that there was a transmission of shares by operation of law. This was notwithstanding that s. 183(2) of the Companies (New South Wales) Code (NSW) ("NSW Companies Code") had specified that transfers in shares had to take place by way of an instrument of transfer:

> ... this court, applying our rules of private international law, will recognise and give effect to the transfer of assets and assumption of liabilities for which Yugoslavian law provides ... If what happened [ie the succession of corporate personality] is to be regarded as including a transfer of shares in Sidex Australia, it was, I think, one to which s. 183(2) of the Companies (NSW) Code applied: that is, the lack of a proper instrument of transfer did not prejudice the power of Sidex Australia to register the 'new' Sour Sipad as a shareholder, that body being a person to whom the right to shares in Sidex Australia had devolved by operation of law. I think, therefore, that the right to correct the register and the possibility of an order for rectification continued unaffected.

[57] Based on the authorities cited above, I hold that the plaintiff is entitled to be registered as a shareholder of the company in place of Solartech in respect of the TS shares without the need for the share transfer documents.

[58] The devolution of ownership of the TS shares is one that took place by operation of law and is a process which should be classified as a transmission, rather than a transfer within the meaning of the CA 2016.

[59] Accordingly, I allowed an order in terms of the originating summons.